TAN CHOON NIK & ANOR.

v.

AMERICAN INTERNATIONAL ASSURANCE CO. LTD.

HIGH COURT MALAYA, ALOR SETAR
SYED AGIL BARAKBAH J
[CIVIL SUIT NO. 140 OF 1979]
21 AUGUST 1982

INSURANCE: *Life insurance - Whether agreement ever came into force - Effect of declarations made by insured - Whether part of contract - Whether fraudulent.*

The plaintiffs were administrators of the estate of the deceased who had in his lifetime executed a life policy agreement with the defendant company. They claimed against the defendant company the amount payable on the death of the deceased. The defendant company, on the other hand, contended that the policy was void. They alleged that the policy was subject to a condition precedent that the deceased was in good health at the time it was issued and that in fact the deceased was not in good health at that time. They also alleged that the declarations made by the deceased in the proposal form, which was part of the contract, regarding his health, were untrue.

Held:

[1] The truth of the answers in the proposal form were not made the basis of the contract between the parties. If a statement which cannot be based on the proposer's own knowledge is required to be true, an express warranty, making the truth of the answers a condition precedent to the liability of the defendants on the policy, is necessary. (*Joel v. Law Union and Crown Insurance Company* [1908] 2 KB 863 at 873). In the case before the Court it was expressly provided that the declarations by the deceased in the proposal form were to be deemed to be representations, and not warranties, in the absence of fraud.

[2] The onus was on the defendant company to prove fraud beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 121 FC) and this it had failed to do. It had to prove not only that the answers given by the deceased were untrue but also that they were untrue to the knowledge of the deceased. There was no evidence to show that the deceased had knowledge that his health was impaired at the relevant time.

[Judgment for plaintiffs.]

Cases referred to:

Joel v. Law Union and Crown Insurance Company [1908] 2 KB 863
Saminathan v. Pappa [1981] 1 MLJ 121

Other source referred to:

Halsbury's Laws of England 3rd Edn., Vol., 22 p. 191 p. 183, para 365, para. 351.
Insurance Law of Malaysia by Dr. Myint Soe on pp. 44 and 45

For the plaintiff - Choe Kuan Him assisted by T.S. Marbeck
For the defendant - Lee Tat Boon.

JUDGMENT

Syed Agil Barakbah J:

The plaintiffs are the administrators of the estate of Kang Liang Weng @ Kang Chit, since deceased. Their claim against the defendant, the American International Assurance Co. Ltd. are for the sum of RM50,000 being the amount payable on the death of the deceased who had in his life-time executed a life policy agreement with the defendant company for the said sum to be paid on his death, bonuses accrued to the said policy, interest on the judgment sum at 6% per annum and costs. While admitting the execution of the policy the defendant company averred at para 3 of the defence that the policy was issued on the faith of the proposal form signed by the deceased that the answers to the questions in the application form were the basis upon which the said policy was granted. They also admitted that he deceased died on 16 August 1975 but denied that the said policy was then in force or ever came into force. Their ground was that vide declaration (c) of the application form the policy should not take effect unless the assured was in good health at the time it was issued and the first premium was paid. They maintained that he was not in good health at that time. They also alleged that the said proposal did not contain a true statement because at declaration (b) of the policy the deceased stated that his health was not impaired in any way whereas in fact and in truth he was suffering from dysphagia and cancer of the oesophagus. In view of the above they maintained that the said policy was void.

During the proceeding Mr. Choe Kuan Him assisted by Mr. T. S. Marbeck appeared for the plaintiffs and Mr. Lee Tat Boon for the defendant company. The agreed bundle of documents was marked Ex. A and the statement of agreed facts was marked Ex. B. Both counsels agreed that there were 4 issues to be determined:

1. Whether the answers in the proposal form were the basis of the contract;
2. Is it a condition of the policy that it shall not take effect unless deceased was in good health when the policy was issued;
3. If the answer to 2 above is in the positive, then the next question is whether the deceased was in good health at the time the policy was issued; and
4. Are the answers to questions 2 (a) and 4 (e) and (f) under Part II of the Statement to the medical examiner untrue?

With regard to the first question, it is noted that on the front page of the policy apart from the policy number, the name of the assured and his age, the policy date was 14 October 1974 and the maturity date was 14 October 2024. The face amount (basic policy) was RM50,000 payable at death or maturity. The premium of RM1,772.50 was payable as of the policy date and every 12 months thereafter and the 50 full years' premium has been paid or until prior death of the assured. There are also supplementary contracts for accident benefits and hospitalisation benefits, beneficiary is the wife of the assured, the first plaintiff. Under general provisions on the next page, below the heading "The Contract" the following words appear:

> This policy and the application for it, a copy of which is attached hereto and made a part hereof, together with any supplementary contracts applied for which are attached hereto and made a part hereof, constitute the entire contract. All statements made in applying for the contract will, in the absence of fraud, be deemed representations and not warranties. No statement will be used to invalidate the contract nor to defend against a claim under it unless contained in the written application. (Exhibit A p. 1)

In the proposal form (Exhibit A p. 5) under Part I the deceased made a declaration, the relevant parts of which read as follows:

> I declare and agree on behalf of myself and any person or persons, firm or corporation, who may have or claim any interest in any assurance on this application that:
>
> (a) ...
>
> (b) All the forgoing statements and answers together with the statements and answers which may be made in Part II to the company's medical examiner(s) or authorised agent, are full, complete and true, and I understand that the company, believing them to be such, will rely and act on them, otherwise any policy issued hereunder may be void (s. 16(4) of the Insurance Act).
>
> (c) The assurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my lifetime and good health, provided, however, that if any payment of premium is made in cash at the time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply hereto and are agreed to.
>
> (d) All my declarations herein made, and my statements to the company's medical examiner(s) and/or the authorized agent, together with the policy shall constitute the entire contract between the parties thereto...

The declarations appeared below Part I which contains answers made by the assured pertaining to his personal particulars. On the top of the page appears an important note saying:-

> Pursuant to s. 16(4) of the Insurance Act, you are to disclose in this proposal form, fully and faithfully, all the facts which you know or ought to know, otherwise the policy issued hereunder may be void.

It is pertinent to not that pare (b) of the declaration also include statements and answers made in Part II to the company's medical examiner or authorised agent. Part II is relevant to the issues under consideration. At paras. 2 and 4 thereof the questions and answers are as follows:

> 2 To the best of your knowledge and belief:-
>
> *Question:* (a) Is your health impaired in any way?
>
> *Answer:* No.
>
> 4. To the best of your knowledge and belief, have you ever had or been told you had or been treated for:
>
> *Question:* (e) Cancer, tumor, cyst or growth of Any kind?
>
> *Answer:* No.
>
> *Question:* (f) Indigestion; ulcers; hernia or Any disorder of gall bladder, liver, stomach or digestive organs?
>
> *Answer:* No.

It is common practice in life insurance to find inserted an express condition in the policy that the truth of any statement made in the proposal is either warranted by the proposer or is to be a condition precedent to the enforcement of the contract, or is to be a basis at which the contract is made, in which case honest of belief in the truth of the statement is not sufficient. (*Halsbury's Laws of England*) 3rd Edn., Vol., 22 p. 191 para 365. In most proposal forms the basic clause runs something like this:

> I declare that the particulars and statements made by me above are true, and I agree that they shall be the basis of the contract between me and the ... company.

The effect of this clause is to incorporate the answers into the insurance policy although they are not set out in the policy. An incorrect answer to any one of these questions is fatal to the insured's claim. This is so whether he answered the question in good faith to the best of his knowledge or indeed, whether his response related to a material fact or not *Insurance Law of Malaysia* by Dr. Myint Soe on pp. 44 and 45).

The accepted principle is that the answers to the questions are to be the basis of the contract must be stated plainly, i.e. that they are made part of the basis of the contract (*Joel v. Law Union and Crown Insurance Company* [1908] 2 KB 863 on p. 873]. In that case it was alleged by the defendants that the truth of the answers to the questions was a condition precedent to the enforcement of the contract and the basis of the contract. The facts were that the proposal by RM. for life assurance contain a declaration to the effect that certain particulars appearing on the face of the proposal in the shape of answers to questions were to the best of her knowledge and belief true and she agreed that the proposal and declaration should be the basis of the contract between her and the insurance company. Vaughan Williams LJ did not agree to the defendant's contention that the plaintiff's signature at the end of the answers coupled with her declaration with reference to the proposal for her assurance and her declaration that the answers to questions were all true, made these answers also the basis of the contract. Nothing was done or stated plainly that such answers were to be the basis of the contract.

On p. 874-75 His Lordship stated:

> With reference to the questions of October 31, it is to be observed (1) that unless these questions are expressly made part of the basis of the contract, they appear to be, as the questions on the face of the proposal are in terms stated to be, questions to be answered "to the best of my knowledge and belief"; (2) that on their face the questions are questions the answers to which no person would warrant. The questions are such as no one but a medical man could answer with an approach to certainty. They are questions to which it would be unreasonable to expect warranted answers. Honest answers were the most anyone could expect ....

And further down he continued:

> I do not think that there is anything in law to make the truth of the answers a condition precedent to the liability of the defendants on the policy, and, if the truth of the answer were not such a condition, it comes within the statement of Wiles J. in his judgment in *Wheelton v. Hardisty* 8 E & B 232 at p. 299 3N2, where he says, "unless it was untrue to the knowledge of the plaintiffs, and therefore fraudulent, the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect. Here is no such stipulation. The mere recital of such a statement in the policy would not alter the general law, or convert such statement from a mere matter of representation into a condition precedent.

Moreover, in life insurance it is often sufficient that a representation given on the basis of knowledge or belief is honestly made; if a statement which cannot be based on the proposer's own knowledge is required to be true, an express warantee is necessary (*Halsbury's Laws of England*) Vol., 22 p. 183 para. 351.

In the present case the declaration at para. (b) the proposer agreed that "all the statements and answers are full, complete and true" and at para. (c) the proposer accepted the assurance would take effect conditional, among others, upon the first premium thereon having been paid in full during his lifetime and good health. Further at para. (d) he confirmed that all his declarations and statements to the company's medical examiner together with the policy shall constitute the entire contract between the parties. Nevertheless the provision appearing under "The Contract" as stated earlier which states, *inter alia*, that "All statements made in applying for the contract will, in the absence of fraud, be deemed representations and not warranties ...", cannot be ignored. To my mind it is clear that the former provisions including the declarations are intended by both parties to be subject to the latter. In the result if any representations by the assured are untrue the onus is on the insurers to prove fraud. If they succeed in doing so, then the representations become warranties. The answer to the first question whether the answers were the basis of the contract, is in the negative. Likewise, if the answers to the remaining questions are in the positive, they are also subject to the same principle.

A contract of insurance is one of *uberrimae fidei* i.e. utmost good faith. Generally any "non-disclosure" or "misrepresentation" by one party would entitle the other party to avoid the contract. However in proving fraud the defendants have to prove that the answers to the questions referred to in Part II of the policy are untrue to the knowledge of the deceased (insured). The onus of proving fraud in this country is proof beyond reasonable doubt (*Saminathan v. Pappa* [1981] 1 MLJ 121).

The defendants called Dr. Mahadev Krishnan (DW1), an experienced surgeon practising at Jalan Ampang, Kuala Lumpur, specialised in the surgery of organs in the chest, including the lungs, heart and oesophagus and familiar with the treatment of cancer of oesophagus. He gave his opinion basing on the three medical reports (on pp. 14, 15, 16 and 19 of the admitted bundle of documents, Exhibit A) which he had studied. He gave quite a detailed description of the symptoms, types and effect of cancer of oesophagus. He was of the opinion that at the material date the deceased signed the proposal form, the deceased was already having symptoms of cancer of oesophagus based particularly on the report of Dr. Minder Singh, General Hospital, Alor Star (p. 19 of ExA). The report shows that the deceased complained of dysphagia i.e. difficulty in swallowing solid food and sticking of food at the upper end of the sternum for about three months prior to the examination. He was first seen on 3 November 1974, less than a month after he signed the application of insurance form and the declaration. He was admitted on 7 November 1974 and medically examined and found to have a growth involving the anterior wall of the oesophagus. DW1 stated that the doctor who examined the deceased when he applied for the policy would not be able to detect cancer unless the deceased had told him that he had difficulty in swallowing or had weight loss or digestive symptoms. However a thorough medical examination with modern instruments applied to the gullet, would be necessary to detect cancer. He also gave the opinion that since swallowing is a very basic and necessary function of a human being, the difficulty affects the health of a person and disturbs him psychologically. Basing on the reports he concluded that the deceased would have known that his health was impaired at the time he gave the answers to the doctor. It is to be noted that DW1 gave his opinion based on the

three medical reports of three different doctors who had received information of the complaint from the deceased on three different stages. The earliest report from the GH Alor Star did not show any loss of weight or vomiting which was noted subsequently in the second report from the Hospital Advent Penang, including abdominal pain and the third report by the Penang Medical Centre. It seems to me that the health of the deceased deteriorated subsequently after going to the hospital for checking. He could not have been aware at the material time that he was having symptom of cancer. Indeed as agreed by DW1 difficulty in swallowing could be from a number of causes such as sore throat or tonsils. It was therefore reasonable in the circumstances for the deceased to answer the question in the negative that his health was not impaired in any way to the best of his knowledge and belief.

It would have been appropriate for the defendant to call the doctor who questioned and examined the deceased at the material time so that firsthand information as to the manner he explained the question to the deceased whether the deceased's health was impaired in any way or whether or not the deceased had told him about difficulty in swallowing could be obtained. Moreover, in the absence of his evidence, DW1 gave his expert opinion based merely on the medical reports and his professional experience in concluding that the deceased knew that his health was impaired at the material time. With respect to DW1 I have reason to doubt that the deceased "to the best of his knowledge and belief" was aware that his health was impaired in any way when he answered in the negative. In my view it was an honest belief of a layman. The fact that he had also taken supplementary contracts for accident and hospitalisation benefits supports this view. There was no evidence that he was having any pain or vomiting until subsequently. There was also no evidence to show that prior to that he had been told or been treated for cancer.

With regard to abdominal pain the report shows that he complained of it subsequently in May 1975.

Considering the above I conclude that the defendants have failed to prove fraud on the part of the deceased. In the circumstances I give judgment for the plaintiff as prayed with costs.

Also found at [1982] CLJ 570